
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: October 30, 1991
CASE NO. 86-ERA-4

IN THE MATTER OF

PAUL A. BLACKBURN,
COMPLAINANT,

v.

METRIC CONSTRUCTORS, INC.,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER
ON DAMAGES AND ATTORNEY FEES
AND REMAND ON ATTORNEY FEES

Before me for review are the Recommended Decision and Order on Remand (Remand R.D. and O.), issued February 13, 1989, the Recommended Supplemental Decision and Order - Granting Attorney Fees (R.S.D. and O.), issued April 5, 1989, and the Order Denying Request for Reconsideration, issued April 18, 1989, by the Administrative Law Judge (ALJ) in this case under the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). These decisions were issued after a hearing held

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pursuant to an earlier decision of the Secretary which: (1) found that Respondent violated the ERA by discharging Complainant for engaging in the protected activity of refusing to work in what complainant believed was an unsafe area; (2) ordered Respondent to reinstate Complainant; and (3) remanded the case to the ALJ for receipt of evidence necessary to determine back pay/and or compensatory damages and to determine attorney

fees. *See Blackburn v. Metric Constructors, Inc.*, Case No. 86-ERA-4, Sec. Dec. (Remand order), June 21, 1988, slip op. at 16-17.

The ALJ's Remand R.D. and O. recommends the award of back pay and compensatory damages to Complainant and the ALJ's R.S.D. and O. recommends awards of attorney fees and costs.[1] Upon review of the entire record and the exceptions and arguments of the parties, I have modified the ALJ's findings and orders on remedies and on costs, and remand this case for further consideration of attorney fees for Complainant's current counsel.

BACK PAY

The ALJ found Complainant entitled to back pay from the date of his termination in September 1984 to the date he became self-employed at the end of 1987. Both parties raise objections to the ALJ's recommended award.

Back pay Period

Metric contends that it is liable for back wages only until the end of 1984, when the project for which Complainant was hired ended. Respondent's Brief in Opposition to the Recommended Decision and Order on Remand (Resp. Brief) at 6-7. Complainant contests the ALJ's finding that Metric's back pay liability is cut off by Complainant's self-employment and seeks back pay from the date of discharge to the date of the 1988 hearing. Complainant's Exceptions to Recommended Decision (Comp. Exceptions) at 3-6.

The ALJ rejected Metric's contention that its back pay liability runs only until the end of the project for which Complainant had been hired. The record reveals that, in March 1984, Metric contracted with Carolina Power and Light (CP&L) to perform construction work during an "outage" at CP&L's H.B. Robinson plant in Hartsville, South Carolina. T. at 87.[2] Complainant, one of more than 45 electricians Metric employed on this contract, T. at 92, was hired on March 28, 1984, and worked through September 5, 1984. T. at 7. The CP&L plant was only 19

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miles from Complainant's home, so he commuted daily to the worksite. T. at 31. Metric hired Complainant for the duration of the project covered by this contract, whatever that duration might be. T. at 33. According to David LaBounty, Metric's Vice- President of Industrial Relations and Personnel Services, CP&L terminated Metric's contract at the end of 1984 and assigned that work to another company. As a result, Metric terminated the electricians working on that project by serving them with reduction-in-force notices. T. at 91. Complainant acknowledges that, had he not been unlawfully discharged in September 1984, he would have had to find another job when the project ended. T. at 34.

The Secretary has adopted for ERA cases the "long accepted rule of remedies in labor law that the period of an employer's liability ends when the employee's employment would have ended for reasons independent of the violation found." *Francis v. Bogan*, Case No. 86-ERA-8, Sec. Final Dec., Apt. 1, 1988, slip op. at 6. *See also Martinez v. El Paso County*, 710 F.2d 1102, 1106 (5th Cir. 1983) (cutting off back pay because, even if transferred to position sought, plaintiff would have been terminated in three months when position eliminated); *Walker v. Ford Motor Company*, 684 F.2d 1355, 1363 (11th Cir. 1982) (terminated participant in minority automobile dealership training program awarded back pay only until end of program because no certainty he would have been offered dealership on completion of program); *Welch v. University of Texas and Its Marine science Institute*, 659 F.2d 532, 535 (5th Cir. 1981) (back pay awarded from date of constructive discharge to date grant expired because "it is simply a matter of speculation" whether grantee would have received another grant); *Lamb v. Drilco Division*, 32 FEP Cases 105, 107 (S.D. Tex. 1983) (discriminatorily discharged employee awarded back pay until date would have been laid off in reduction-in-force). Applying this rule, Complainant would be entitled to back pay only until the end of the project for which he was hired. The ALJ, however, extended Metric's back pay liability past the end of 1984, stating: "[t]he short answer is that, because of his unlawful termination, Complainant was clearly in a less favorable position than his co-workers to be hired on another Metric project. Accordingly, the end of 1984 cannot be considered an appropriate cutoff for computing his back pay." Remand R.D. and O. at 5. Metric contends that this finding "is based upon an assumption of facts not in evidence." Resp. Brief at 6-7.

I agree with Metric. The ALJ failed to indicate what evidence he relied on for his finding. Review of the record, moreover, does not reveal evidence to establish that, because of his termination from Metric's project at the CP&L site, Complainant had less of a chance than his co-workers to be hired for future Metric projects at other sites. Complainant, apparently, felt that he would never again be hired by Metric. He testified that he "couldn't go back with Metric because I'd already been terminated from them." T. at 23. Complainant, however, never tested this hypothesis. In the absence of evidence that he applied to other Metric projects and was not hired, Complainant's personal feelings, no matter how plausible they may seem, do not rise to a level above mere speculation.

Complainant also testified that, prior to his termination, he had expected that, when Metric's project at CP&L ended, he would be hired on another Metric project because it was Metric's policy to give preference to former employees. T. at 34-5. Complainant's testimony, however, is unsupported by other evidence in the record. LaBounty denied that Metric has a policy of giving preference to former employees, although he did acknowledge that individual superintendents might give preference to hiring craft people they had worked with before over unknown applicants and that preference is normally given to local hires over "travellers" -- workers who "work from [one] area to another." T. at 83. According to LaBounty, Metric does furnish former employees, on request, information about which projects are hiring and whom to contact for employment. All

hiring, however, is done locally and new job applications must be filed for each project because separate project personnel files are set up. LaBounty also testified that, of the 45 plus electricians on the CP&L project, only two were employed on Metric's next project, which was in Florida. T. at 91-2, 104. Other than his general statement of what he believed Metric's hiring policy to be, Complainant presents no evidence to rebut LaBounty's testimony. Complainant has the burden of establishing that he would have been hired on another Metric project. *Walker*, 684 F.2d at 1363. He has failed to meet that burden. Accordingly, I reject the ALJ's finding that Complainant's unlawful termination placed him in a less favorable position than co-workers to be hired on another Metric project.

In determining the extent of Metric's back pay liability, I have considered also Complainant's contention that Metric blacklisted him,[3] but conclude that he failed to sustain his

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burden of establishing blacklisting by Metric. Evidence relevant to the blacklisting contention consists of the testimony of Complainant and Metric's project manager that Complainant's termination report noted that he was not to be rehired at the Robinson site. T. (185) at 48, 61. Also, Complainant testified that, two weeks after his termination by Metric, he obtained employment with Power Plant Maintenance (PPM), another CP&L subcontractor. T. at 22-23. (Complainant failed to establish the location of this worksite. *Compare* T. at 22 and ALJ Exh. 1 *with* T. (185) at 28 and Comp. Reply at 5.). Because Complainant could not obtain the necessary security clearance, T. at 23, PPM transferred him to a North Carolina project where he worked for two weeks. T. 11-12; RX 1 p. 5. Complainant claimed that he was told "by the people at CP&L" that he could not work at the PPM job he was originally hired for because he had been blacklisted by Metric. T. at 22. LaBounty contradicted Complainant's testimony, denying any blacklisting by Metric and any knowledge that CP&L blacklisted Complainant. T. at 93-94, 104. Furthermore, LaBounty denied that Metric ever gave Complainant "a bad recommendation" because "his file was kept at the job site, and was put up, and if someone does. -- It is our policy that if someone makes an inquiry as to an ex-employee, we give them their dates of employment and their classification. That's it." T. at 103.

Complainant's testimony and the testimony of the plant manager, coupled with LaBounty's testimony that Complainant's employment record was kept at the CP&L site, suggest the possibility that Metric's directive that Complainant riot be rehired at the site resulted in the loss of his job with PPM. The record, however, does not contain evidence sufficient to establish that this was the case. Complainant presented no other evidence to support his assertion that his security clearance at PPM was denied because of blacklisting by Metric. His PPM termination notice is not in the record. No one from PPM or CP&L testified. No evidence was presented as to the procedure for obtaining a security clearance or as to any involvement therein by Metric. Complainant does not identify "the people at CP&L" who told him that Metric "blackballed" him, and there is

nothing to show that the CP&L people who may have denied him his clearance were aware of Metric's directive. Moreover, Complainant was vague and evasive when testifying about Metric's alleged involvement in denying him security clearance. His testimony reveals that blacklisting by Metric was merely an assumption on his part.

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Q. Is it your contention or testimony that you were -- I think you used the expression blackballed from employment?
A. That's right.
Q. And how did that occur? What is the circumstance of that?
A. I went to -- applied a job with Henry Marie at Power Plant Maintenance in Society Hill, South Carolina, and he took me to the job, and they said I couldn't go on it because I had been fired by Metric on that job which they blackballed me.
Q. When you say "they" said that, who is "they"?
A. The people at CP&L.
Q. So, it was CP&L that denied you the employment with Power Plant Maintenance, is that correct?
A. Yes, sir.
Q. It wasn't Metric. it was CP&L?
A. Well, I couldn't go back with Metric because I'd already been terminated from them.
Q. Well, but isn't it true Metric wasn't even on the job at that time? Is that correct?
A. No, sir. This was only two weeks later.
Q. Okay. But the reason that Power Plant Maintenance Company did not employ you was because of CP&L not issuing you the passes, I think you said. Is that correct?
A. Yes, sir. Which in turn was by Metric.
Q. That's your speculation though. You don't know that. Is that correct?

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A. Well, it speaks for itself.

T. at 22-23.[4]

Complainant argues that LaBounty confirmed blacklisting when, in responding to whether it was unreasonable for Complainant to assume that his discharge from Metric prevented him from working for PPM, LaBounty replied that "[k]nowing the way Carolina Power and Light operated, they may well have said something to them." T. at 105. LaBounty's statement is clearly not based on actual knowledge. Moreover, CP&L's rejection of complainant simply because it knew that Complainant had been terminated by Metric (even if CP&L knew the reason for Complainant's termination) would not be a basis for imposing liability on Metric absent evidence that Metric instigated that rejection. I, therefore, conclude that Complainant has failed to establish that his termination from PPM was caused by blacklisting by Metric, and that there is no basis for imposing upon Metric liability for back wages past the date of termination of its project at CP&L.

In so finding, I reject complainant's argument that Metric's back pay liability cannot be cut off at termination of its project because Metric has failed to prove the exact date on which the project ended. Complainant's Reply to Respondent's Brief In Opposition to the Recommended Decision and order on Remand (Comp. Reply) at 2. LaBounty testified that CP&L terminated Metric's contract at the end of December 1984, and that Metric had no more electricians on that job after that year. T. at 91.[5] Complainant presented no controverting evidence. For purposes of calculating Complainant's back wages, therefore. the appropriate cutoff date is December 31, 1984.

Accordingly, I reject the ALJ's finding that Metric is liable for back wages until the date of Complainant's self- employment, and find that Metric is liable for back wages from September 6 through December 31, 1984,

Amount of Back Pay

Metric contests the ALJ's findings as to Complainant's straight time and overtime entitlements for 1995 through 1987. Because I find that Metric's back pay liability ceases at the end of 1984, I resolve only those issues pertinent to calculating dollar amounts for straight time and overtime earnings between September 6 and December 31, 1984.

Metric objects to using $12/hour as the hourly rate in calculating Complainant's straight time compensation for back pay purposes, arguing that the hourly rate should be $11.50 since

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Complainant would have earned only $11.50/hour if Metric had employed him for its Florida project after Metric's CP&L project was terminated. Resp. Brief at 4.

I reject Metric's argument. The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position be would have been in if not discriminated against. *See Sure Tan v. NLRB*, 467 U..S. 883, 900 (1984) (National Labor Relations Act); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982) (Title VII, Civil Rights Act of 1964); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1097 (9th Cir. 1982) (Age Discrimination in Employment Act). Back pay awards should, therefore, be based on the earnings the employee would have received but for the discrimination. *See Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984). There is no question that the appropriate hourly rate for determining Complainant's back pay award is $12. That is the rate Metric was paying him when he was discharged, and there is no evidence that Complainant would not have been paid this rate had he continued to be employed until the end of the project.

In calculating Complainant's straight time compensation, the ALJ multiplied the hourly rate by 2,000 hours, which he found to be the number of straight time hours Complainant would have worked annually. Metric raises no objection to this annual figure. Since

Complainant would have worked approximately 1/3 of these hours had he not been terminated,[6] he is entitled to be compensated for 667 hours straight time earnings. Accordingly, Complainant is entitled to $8,004 as lost straight time earnings.

In calculating Complainant's overtime earnings on an annual basis, the ALJ adopted the dollar amount calculated by the Complainant's expert. Remand D. and O. at 2. The expert's calculation was based on Complainant's overtime earnings at Metric. These earnings, Metric argues, overestimate the overtime pay which Complainant would have earned with Metric subsequent to his discharge because he would not have worked as much overtime during the remainder of the year.

The only evidence in the record as to what Complainant would have earned from the date of his discharge until the end of 1984 is the testimony of LaBounty: that, following Complainant's termination, the overtime work decreased so that Metric's electricians worked a maximum of 160 hours overtime as compared to the 344.5 hours of overtime that Complainant had worked; that originally the CP&L project had required an unusually high amount

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of overtime because a vessel had to be removed from the containment unit on a scheduled date; and that a lot of overtime had been scheduled previously because of Metric's inability to hire enough electricians. T. at 88-90. LaBounty's testimony is uncontradicted. Complainant does not show that, following his termination, Metric's electricians continued to work at the high rate of overtime he had worked. Complainant is, therefore, entitled to $2,880 ($18/hour x 160 hours) in lost overtime earnings.

Complainant's back pay from date of discharge to end of 1984 totals $10,884. From this sum must be deducted $10,775.34 earned by Complainant during the same period in replacement employment.[7] RX 1 at 2. *See Ford Motor Co. v. EEOC*, 458 U.S. at 231; *Wells v. Kansas Gas and Electric Co.*, Case No. 85-ERA-0022, Sec. Dec., Mar. 21, 1991, slip op. at 17, *appeal docketed*, No. 91-9526 (10th Cir. May 3, 1991) ("Interim earnings . . . should be deducted from back pay due").

Recomputing Complainant's wage loss on the basis of the above figures, I conclude that Complainant is entitled to $108.66 in back wages from the date of his termination by Metric through December 31, 1984.

COMPENSATORY DAMAGES

Emotional Distress

The ALJ awarded Complainant compensatory damages in the amount of $10,000 "for emotional distress and mental English arising out of his unlawful termination." Remand R.D. and O. at 6. Where a violation has been found, ERA Section 5851(b)(2)(B) permits

the award of compensatory damages in addition to back pay. *DeFord v. Secretary of Labor*, 700 F.2d 281, 288 (6th Cir. 1983); 29 C.F.R. § 24.6(2)(1990). Compensatory damages may be awarded for emotional pain and suffering and mental anguish. *DeFord* 700 F.2d at 283; *DeFord v. Tennessee Valley Authority*, Case No. 81-ERA-1, Sec. Order of Remand, Apr. 30, 1983, slip op. at 2-3. *See Johnson v. Old Dominion Security*, Case Nos. 86-CAA- 3, 4, 5, Sec. Dec., May 29, 1991, slip op. at 25-26. Thus, where appropriate, complainant may recover for emotional stress and mental anguish that is the "proximate" result of his unlawful termination. *See Busche v. Burkee*, 649 F.2d 509, 519 n.13 (7th Cir. 1981).

The ALJ based his recommendation on the following:

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> The firing by Metric lowered Mr. Blackburn's self esteem. (Tr. 30). He became depressed and had difficulty sleeping. (Tr. at 12-13, 59). The stress of the termination disrupted his family, caused quarrels at home and adversely affected his relationship with his wife and children. (Tr. 30-32, 59-60). The family did not seek professional counseling because they could not afford it. (Tr. 63).

Remand R.D. and O. at 4, #7.[8] These findings were based on the testimony of Complainant, his wife and his father.

Complainant contends that his emotional stress and mental anguish, his family problems and his loss of self esteem resulted from his diminished financial situation brought about because of his inability to find a job following his termination from Metric. T. 13, 62. The record, however, does not support that, following his termination from Metric, there was so drastic a change in Complainant's financial situation as Complainant describes.

Within two weeks following his termination, Complainant was employed at PPM at $11/hour. From October 1984 past the end of that year, he was employed by Daniel Construction Company at $13.95/hour. R.X. 1 at 5. While his job with Daniel was out of town and involved living expenses, his straight time earnings were almost $2/hour more than he had earned at Metric. Moreover, according to Complainant's wife, the financial difficulty resulting from Complainant's having to pay living expenses while working out of town was a problem experienced before, and not caused by Complainant's discharge from Metric. T. at 63. Complainant agreed on cross examination that there was not much disruption in his economic situation following his termination by Metric. T. at 27.

Furthermore, comparison of Complainant's annual earnings before and after his employment with Metric does not establish a vast drop in earnings. For the three years before he worked for Metric, Complainant's earnings ranged from $16,000 to at least $27,000.[9] For the three years following his termination, Complainant's earnings ranged from $22,000 to $25,000 approximately, the lowest figure being earned in 1987. R.X. at 4-5. Complainant was a "traveler" both before and after his termination by Metric, and

some of his jobs during both periods required him to live away from home. Admittedly, Complainant's financial situation improved during the 5 months and one week he

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worked at Metric because there was substantial overtime and he could live at home. However, had he worked until the end of the project, his overtime would have been reduced by more than half, resulting in a considerable reduction in earnings. Furthermore, Complainant appears to have been employed regularly from October 1984 until August 1986, which belies a direct relationship between his personal and family problems and his termination by Metric. Under the above circumstances, I do not deem appropriate compensatory damages for emotional distress and mental anguish. *See Hobson v. Wilson*, 737 F.2d 1, 61-62 (D.C. cir. 1984), *cert. denied*, 470 U.S. 1089 (1985) (factfinder may measure the testimony against the circumstances of the case to gauge whether the violative conduct conceivably justified the distress).

Employee Expenses

The ALJ awarded Complainant "employee expenses" for 1985-1987, Remand R.D. and O. at 4 and 6, representing Complainant's living costs while working out of town. Because Metric's liability for Complainant's economic losses ceases at the end of 1984, his entitlement for these expenses also ends as of that date.

Complainant's expert testified that Complainant's expenses in 1984 were ,750. T. at 42. I credit this testimony. Respondent presented no contrary evidence and does not contest the award of expenses. Accordingly, I award Complainant ,150 in compensatory employment expenses.

INTEREST

Complainant excepts to the ALJ's failure to assess any interest on amounts due Complainant and requests the award of interest in the amount of 10% compounded annually on his back wages and travel expenses.[10] Comp. Exceptions at 1-2. Metric argues that there is no legal basis "or the assessment of interest since it is not provided for in the statute. Metric further contends that "it would be inequitable to impose any such interest" because "adjudication of this case was grossly prolonged due to no fault on the part of Respondent." Respondent's Reply to Complainant's Request for Reconsideration and Fee Petition (Resp. Reply on Reconsideration) at 1-2.

The fact that the ERA does not expressly provide for interest on back pay does not preclude it. Back pay awards are designed to make "whole" the employee who has suffered economic loss as the result of the employer's illegal discrimination. The assessment of prejudgment interest is necessary to achieve this end. *See Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865

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F.2d, 1461, 1471 (5th Cir. 1985) ("[t]he primary rationale for this conclusion is that unlawful discrimination deprives an employee of his salary as well as the use of that salary during the interim period") (emphasis in original); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1426 (7th Cir. 1986) ("full compensation requires recognition of the time value of money"). In accordance with this policy, prejudgment interest on back pay awards has been assessed in cases arising under the ERA.[11] *See Wells*, Case No. 85-ERA-0022, slip op. at 17; *Wells v. Kansas Gas & Electric Company*, Case No. 83-ERA-13, Sec. Dec., June 14, 1984, slip op. 12, *aff'd. on other grounds sub nom. Kansas Gas & Electric v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Landers v. Commonwealth-Lord Joint Venture*, Case No. 83-ERA-5, Sec. Dec., Sept. 9, 1983. Accordingly, Respondent Metric shall pay prejudgment interest on the back pay award at the rate specified in 26 U.S.C. § 6621 (1988).[12]

REINSTATEMENT

Complainant argues that Metric failed to comply with the Secretary's 1988 Order that "Respondent reinstate Complainant to his position as an electrician, or to a comparable position with pay and benefits." He seeks $37,284 in damages representing the "present value of the lifetime earnings differential between an electrician's job at comparable pay versus the electrician's job actually offered" by Metric. Compl. Exceptions at 7. *See also* T. at 48.

Although the Secretary's June 1988 Order required Metric to reinstate Complainant, the evidence presented at the September 1988 hearing revealed that Complainant had been hired only for the duration of Metric's project at the Robinson plant and that he would have lost his job at the end of December 1984. 1 conclude that it is no longer appropriate to order that Metric reinstate Complainant.

Assuming arguendo that Complainant is entitled to reinstatement, I would still find that, under the circumstances of this case, reinstatement is not an appropriate remedy. The record reveals that, on August 26, 1988, pursuant to the Secretary's June 1988 order, Metric offered Complainant a job at a Metric project near Greenville, South Carolina, as Electrician I at $11.25/hour. CX 106, T. at 17. The job would have lasted approximately one year. T. at 17. It is no clear what

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Complainant was told about overtime work on this job. *Compare id*. with T. at 28. *See generally* T. at 15-18, T. at 78-80.

Complainant testified at the September 1988 hearing that he was not accepting Metric's reinstatement offer because the hourly rate was not comparable to the $12/hour that

Metric paid him 4 years earlier. T. at 20. On September 16, 1988, two days following the hearing, Metric amended its reinstatement offer by offering

> to pay Mr. Blackburn $11.25 per hour on the project payroll and to separately pay him by direct payment from Metric and [sic] additional .75 per hour. Payments of this amount would be issued by Metric at the same time as payments are issued on the project payrolls. This additional base hourly amount would also be increased for overtime work at the same multiple as the multiple applicable to the job rate.

Letter of September 16, 1988, from Burdette, counsel to Metric, to William Reynolds williams, counsel for Complainant. I discern from Complainant's argument in his 1989 exceptions that he did not accept this later offer.

Metric's offer to hire Complainant for its Greenville project constituted a *bona fide* effort to reinstate him since the position offered was comparable to that Complainant held before his illegal discharge. *See Cowen v. Standard Brands*, 572 F. Supp. 1576, 33 FEP 5 (N.D. Ala. 1983). The position was that of Electrician I, the same rating as he had held prior to his discharge. The rates of compensation, both for straight time and overtime, were also the same as prior to his discharge. Although there was an interval of four years between Complainant's discharge and Metric's reinstatement offer, the record reveals that over the intervening years Metric had paid less than $12/hour to electricians in its various projects, T. at 101-102, and that the $12/hour offered Complainant was more than the top rate for the other electricians employed on the Greenville project. T. at 79. There is thus no indication that, had Complainant not been discharged, he could have earned higher wages when working on a Metric project. Furthermore, the record indicates that the Greenville project was the only one of Metric's projects utilizing Electricians I which would afford Complainant more than 2-4 weeks of work. T. at 78. In view of Complainant's rejection of Metric's amended offer, Complainant would not be entitled to reinstatement. *See Giandonato v. Sybron Corp.*, 804 F.2d 120, 124 (10th Cir. 1986) (absent special

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circumstances, employee's rejection of employer's reinstatement offer ends liability for back pay or reinstatement), cited with approval in *Hopkins v. The Shoe Show of Virginia, Inc.*, 678 F. Supp. 1241, 1246 (S.D. W. Va. 1988). The record reveals no special circumstances justifying Complainant's rejection of Metric's offer of reinstatement.

ATTORNEY FEES AND COSTS

The ALJ ordered Metric to pay attorney fees and costs to Complainant's prior attorney who handled his claim through the 1985 hearing and to Complainant's present counsel who litigated Complainant's damages. Fees in the amount of $5,918.50 and costs of $400.92 were awarded to the attorney who handled the initial hearing. *See* Remand R.D.

and O. at 6-8, 9 #3. Metric does not contest this award, and, upon review, I find the fees and costs reasonable. *DeFord*, 700 F.2d at 288-89.

The ALJ awarded $15,812.84 for attorney fees and costs to Complainant's current counsel for the damages litigation before the ALJ. *See* R.S.D. and O. at 2. Respondent objects to the sum awarded for these attorney fees and Complainant objects to the award for the costs.

Attorney Fees

Metric argues that the 128.2 hours billed by counsel are excessive and that a reasonable number of hours would be 65-30, the same as expended by Complainant's former counsel through the initial hearing. Resp. Reply on Reconsideration at 3-4. I accept the ALJ's conclusion that, because the issues involved in the hearings were not identical and because no individual item on the fee petition appears to be unnecessary or excessive, 128.2 hours is the appropriate number.

Metric also argues that the $125 hourly rate is excessive, urging a rate of $95 per hour, the rate the ALJ used in awarding fees to Complainant's former counsel. Id. at 3. The ALJ accepted the rate set forth in senior counsel's affidavit as counsel's normal hourly rate, and gave several reasons why work by such counsel should be compensated at that rate. R.S.D. and O. at 1. I do not accept all of the ALJ's reasons for concluding that $125 is a reasonable rate for counsel's work. The fact that COmplainant and his counsel entered into an agreement requiring Complainant to pay a maximum of $125/hour is not a reason for awarding that hourly rate. Metric is liable only for reasonable attorney fees no matter what amount Complainant may be

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obligated to pay his attorney. *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989) ("[A]ttorney's private fee arrangement standing alone is not dispositive"); *Clark v. American Marine Corp.*, 320 F. Supp. 709, 711 (E.D. La. 1970), *aff'd* 437 F.2d 959 (5th Cir. 1971) ("The criterion for the court is not what the parties agreed but what is reasonable"). *See DeFord*, 700 F.2d at 288-89.

The ALJ also based the hourly rate on the fact that the hearing was held in Columbia, South Carolina, a more metropolitan area than the community of Florence, South Carolina, where counsel is located. I am aware that in *National Wildlife Federation v. Hanson*, 859 F.2d 313, 317 (4th Cir. 1988), the court stated that "[t]he community in which the court sits is the appropriate starting point for selecting the proper rate." The record, however, is devoid of any evidence as to the prevailing hourly rate in either Columbia or in Florence. Accordingly, with reluctance, I remand the issue of current counsel's fee to the ALJ for a determination of the prevailing rate for counsel's services in the relevant market. The ALJ may receive further filings from counsel as to prevailing rates. *See Buffington v. Baltimore County, Md.*, 913 F.2d 113, 129 (4th Cir. 1990); *Plyler*

v. Evatt, 902, F.2d 273,278 (4th Cir. 1990); *Spell v. McDaniel*, 852 F.3d 762, 771 (4th Cir. 1988).

Costs

Complainant sought $2,455.68 in litigation costs. Exhibit C attached to fee petition. The ALJ disallowed telephone tolls, Federal Express charges and copying costs, finding that they are normal overhead expenses. R.S.D. and O. at 2. Complainant excepts to this finding, arguing that, since the agreement between Complainant and counsel specifically requires Complainant to reimburse counsel for these costs, Metric is obligated to pay them. Complainant's Request for Reconsideration of Recommended Supplemental Decision and Order Granting Attorney's Fees. On reconsideration, the ALJ recognized that the arrangement between counsel and Complainant was not dispositive, and denied reconsideration of the amount of costs. Order Denying Request for Reconsideration, April 18, 1989.

I agree with the ALJ that Complainant's agreement with counsel is not a basis for determining which costs are compensable, but do not agree that counsel's telephone tolls, copying costs and Federal Express charges relevant to this litigation are not separately compensable. While normally a part of counsel's overhead, the Fourth Circuit, in which this case arises, has held that copying and telephone costs are reimbursable as part of the attorney's fee because they are

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"integrally related to the work of an attorney" and may significantly contribute to the success of the litigation. *Wheeler v. Durham City Bd. of Ed.*, 585 F.2d 618, 623-4 (4th Cir. 1978). Since such costs are recoverable as attorney fees, they are recoverable here where the statute makes clear that costs and expenses other than attorney fees are compensable. 42 U.S.C. § 5851(b)(2)(B). I, therefore, allow Complainant reimbursement for telephone tolls and copying and for Federal Express charges, another litigation cost. Accordingly, I award Complainant $2,455.68 in litigation costs.

ORDER

Accordingly, it is ORDERED that:

1. Respondent pay Complainant the sum of $108.66 in back wages (including overtime) from September 6, 1984, through December 3, 1987, with interest thereon calculated in accordance with 26 U.S.C. § 6621 (1999), and continuing at such a rate as modified from time to time by the Secretary of the Treasury, until compliance with this order.

2. Respondent pay Complainant the sum of ,750 as reimbursement for employment expenses.

3. Respondent pay the firm of Gergel, Burnette, Nickles, Grant and Ouzts the sum of $5,918.50 for attorney fees and the sum of $400.92 for costs.

4. Respondent pay the firm of Wilcox, Hardee, McLeod, Buyck, Baker the sum of $2,455.68 for costs.

5. This case is remanded to the ALJ for further consideration of attorney fees for services rendered by the firm of Wilcox, Hardee, McLeod, Buyck, Baker in connection with Complainant's claim for damages.

6. Counsel for Complainant is permitted a period of 20 days in which to make a further submission on prevailing rates in support of its damages hearing fee petition and to submit any petition for fees and expenses incurred in review before the Secretary of the ALJ's decisions. Respondent may respond to any further filing(s) by Complainant within 20 days of receipt. Filings by either party shall be limited to specified attorney fee issues.

7. I anticipate that the ALJ will issue a Supplementary Recommended Decision on Attorney Fees within 90 days.

SO ORDERED.

LYNN MARTIN
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The ALJ's Order of April 18, 1989, denies Complainant's request for reconsideration of the costs awarded in the R.S.D. and O.

[2] T. is the transcript of the remand hearing held September 12, 1988. T. (185) is the hearing held December 16, 1985.

[3] Although the ALJ neither discussed nor made any finding on blacklisting, if Metric took action that adversely affected Complainant's employment opportunities with third parties, Metric could be liable for any lost wages resulting from that action. *See Sherman v. Burke Contracting Inc.*, 891, F.2d 1527, 1535-1536 (11th Cir. 1990) (former employer, who persuaded new employer to discharge employee because employee had filed Title VII complaint alleging unlawful termination by former employer, is liable for wages employee would have earned if not discharged by new employer).

[4] Although not evidence, note that Complainant's counsel questioned LaBounty as to whether Complainant's "*inference* that the firing by Metric is what kept him from being able to work for PPM at Carolina Power and Light is an *inference* well taken . . . . " T. at 104 (emphasis added).

[5] LaBounty also testified that Metric "continued to work on that job site into 185 for some period of time," but there is nothing to indicate that this was the same project on which Complainant worked. T. at 106. The project manager testified. that Metric did "all phases of construction work" for CP&L at the Robinson plant. T. (185) at 58.

[6] The ALJ found that September through December equaled approximately 1/3 year. Remand R.D. and O. at 3, n.3. Although Complainant worked the first four days of September, Metric raises no objection to this finding.

[7] Before the ALJ, Complainant argued that interim earnings should not be deducted. Complainant's Post-Hearing Memorandum at 2-6. The ALJ rejected this argument. R.D. and O. at 5. Complainant does not raise this issue before me.

[8] Before me, Respondent does not challenge the ALJ's award of compensatory damages although in Respondent's Post Hearing Memorandum at 7, it objected to such damages. Emotional distress, however, cannot be presumed, and compensatory damages for mental and emotional distress cannot be awarded "without proof that such injury actually was caused." *Carey v. Pilphus*, 435 U.S. 247, 263-4 (1978). Plaintiff has the burden of "proving the existence and magnitude of subjective injuries . . . ." *Busche v. Burkee*, 649 F.2d at 519.

[9] Complainant's expert testified that in 1983 Complainant earned $28,445, T. at 42, and Complainant's post hearing memorandum lists that same figure for 1983. The lower figure of $27,000 was given in Complainant's response to interrogatories. RX 1 at 5.

[10] Since any allowable travel expenses are compensatory damages, I deny Complainant's request for interest on travel expenses. Complainant cites no authority for the assessment of interest on compensatory damages.

[11] I reject Metric's argument that it should be relieved of interest on Complainant's back pay award because of the time elapsed during adjudication of this complaint. Delays in litigation are not grounds for denying back pay. *NLRB v. Rutter- Rex Manufacturing Co.*, 396 U.S. 258, 262-265 (1969); *Berkshire Knitting Mills v. NLRB*, 139 F.2d 134, 141-142 (3d Cir. 1943); *Palmer v. Western Truck Manpower, Inc.*, Case No. 85-STA-16, Sec. Dec., June 26, 1990, slip op. at 12 (where employer has the use of money during the period of litigation, employer is not unfairly prejudiced).

[12] I deny Complainant's request that interest on Complainant's back pay award be calculated by year-end compounding at a 10% rate. Department of Labor regulations implementing Section 3 of the Debt Collection Act of 1982, 31 U.S.C. § 3711(f) (1988), set forth the rate of interest chargeable on debts owed to the Department. Under 29 C.F.R. § 20.58(a) (1990), "[t]he rate of interest prescribed in section 6621 of the Internal Revenue Code shall be sought for backwages recovered in litigation by the Department." While this regulation, by its terms, is not controlling on the question of appropriate prejudgment interest in this case, adopting an approach consistent with the regulation is reasonable. Additional support for this method derives from analogous employment

discrimination cases. *See New Horizons for the Retarded. Inc., et al.*, 283 NLRB No. 181, 125 LRRM 1177 (May 28, 1987); *EEOC v. FLC & Bros. Rebel, Inc.*, 663 F. Supp. 864, 869 (W.D. Va. 1987), *aff'd*, 846 F.2d 70 (4th Cir. 1988). *See also Clinchfield Coal v. Federal Mine Safety & H. Com'n*, 895 F.2d 773, 780 (D.C. Cir. 1990) (approving IRS rate in assessing interest on compensation awards); *Johnson v. Old Dominion*, Case Nos. 86-CAA- 3, 4, 5, slip op. at 24 (approving IRS rate on interest for whistleblowers under Toxic Substances Control Act).